89-101

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLEMAN A. YOUNG,
Petitioner,

v.

THE COUNTY OF OAKLAND and
THE COUNTY OF MACOMB,
Respondents.

PETITION OF COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 17, 1989

INLAND ARONSSON PRINTING, DETROIT, MICHIGAN

QUESTIONS PRESENTED

I.

Do suburban counties which contract with the City of Detroit for sewerage services have standing to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged overcharges for those services where the counties have passed on 100 percent of any overcharge to municipalities and end users as mandated by state statute?

II.

Where state statute requires 100 percent of any alleged overcharge to be passed on by the direct purchaser, is the pass-on a defense to suit by the direct purchaser under Section 4 of the Clayton Act?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, other parties to the proceeding in the Sixth Circuit are the City of Detroit; Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr.; Wayne Disposal, Inc.; Sam Cusenza; Joseph Valentini; Wolverine Disposal, Inc.; Wolverine Disposal-Detroit, Inc.; Charles Carson; Michigan Disposal, Inc.; Walter Tomyn, and Charles Beckham, all of whom were defendants in the district court and appellees in the Sixth Circuit. All of the above parties, with the exception of Charles Beckham, have filed petitions for certiorari with this Court.

Other parties to the proceeding in the district court are Darralyn Bowers and Vista Disposal, Inc.; these defendants did not appear in the Sixth Circuit.

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Petitioner, Coleman A. Young, Mayor of the City of Detroit, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 27, 1989, which reversed the district court's dismissal of respondents' complaint. Certiorari is requested in order to resolve the conflict between the Sixth and Seventh Circuit Courts of Appeal on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 866 F.2d 839, and is reprinted at A-1. By order dated April 19, 1989, the Sixth Circuit denied defendants' petitions for rehearing and suggestions

for rehearing *en banc*. This order is reported at 866 F.2d 839 and reprinted at A-25.

The opinion of the district court dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is reported at 620 F. Supp. 1399 and reprinted at A-29. The order of the district court dismissing the complaint in accord with this opinion is unreported, and reprinted at A-38. The opinion of the district court denying respondents' motion to alter judgment, A-40, is reported at 628 F. Supp. 610. The order of the district court denying respondents' motion to alter judgment, A-49, is unreported.

JURISDICTION

The opinion of the Sixth Circuit was issued January 27, 1989. The Sixth Circuit denied Petitioner's timely-filed petition for rehearing and suggestion for rehearing *en banc* on April 19, 1989. Pursuant to 28 U.S.C. § 2101(c), this petition for certiorari has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a)(1982), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

A. *Background.*

This Petition involves claims by Oakland County and Macomb County, Michigan,[1] against Petitioner, the Mayor of the City of

[1]Oakland and Macomb Counties are collectively referred to as "the counties." Oakland County initially filed suit, and Macomb County later intervened as a plaintiff and filed a duplicate complaint.

Detroit, in his official capacity; the City of Detroit; a city employee; and various sludge disposal companies and persons associated with them.

The City of Detroit has provided sewerage services to suburban communities for many decades. Oakland and Macomb Counties, along with other suburban counties, operate sewage disposal districts on behalf of various municipalities. The counties contract with Detroit for sewerage services. The sewerage services Detroit provides include transportation, treatment and disposal of sewage. Sludge is an end product of the sewage treatment process, which must be hauled to a landfill for disposal. Detroit purchases sludge hauling and disposal services from private contractors. Detroit bills the counties for sewerage services, and makes no separate charge for sludge hauling or disposal. The counties pay Detroit with segregated monies collected from the municipalities. (Complaints ¶¶ 19, 20.)

In 1977, the United States sued the City of Detroit in the Eastern District of Michigan, alleging that Detroit's disposal of sewage was in violation of federal environmental laws and regulations. By a consent decree entered in March 1979, the district court made Petitioner the administrator of the wastewater treatment plant operated by the Detroit Water and Sewerage Department. The order granted Petitioner the power of a receiver.[2]

The counties' antitrust claims arise out of Petitioner's award of a contract for sludge disposal, and the administration of sludge disposal contracts, under the terms of the consent order. (Complaints ¶ 41, 44.) The counties allege that Petitioner and the other defendants conspired to fix prices and monopolize the market for the

[2]Because it required Detroit to dispose of increased quantities of sludge, the order included the power to award sludge disposal contracts "without the necessity of any actions on the part of the [Detroit] Common Council" and "without competitive bidding." *United States* v. *City of Detroit*, 476 F. Supp. 512, 515, 516 (E.D. Mich. 1979). Petitioner was specifically exempted from any duty to, among others, "suburban governments" such as Oakland and Macomb Counties, in the award of such contracts and administration of the wastewater treatment plant. 476 F. Supp. at 521.

sale of sludge disposal services to the City of Detroit, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. As a result, they allege, Detroit procured sludge disposal services at inflated prices and increased its charges for sewerage services to cover these inflated costs. (Complaints ¶¶ 48, 49.)[3]

The counties filed suit as private plaintiffs under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a)(1982), claiming as damages the alleged overcharges they paid with municipality monies. (Complaints ¶ 49.)[4] They are subject to any defense, including lack of standing, available against any other private plaintiff.

B. *The Pass-On.*

For the purposes of the opinion below, the Sixth Circuit "assume[d] . . . that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. Indeed, it is uncontroverted that any overcharges were passed on. The counties allege that they "collect[] revenues from municipalities within each district and pay[] Detroit." (Complaints ¶ 20.) By affidavit, the counties admit that the payments they collect from the municipalities are deposited in segregated funds (the "Sewerage Funds" or the "Funds") specifically established and used to pay Detroit for sewerage services, that these Funds are the sole sources of monies used to pay Detroit for sewerage services, and that county monies are not used for this purpose.[5] Nor, as the Court of Appeals recognized in a prior case arising out of the same

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[3]The counties also assert a pendent state law claim of breach of fiduciary duty against Petitioner, and a RICO claim against the other defendants (but not Petitioner). (Complaints ¶¶ 54-92.) Like their antitrust claims, the counties' breach of fiduciary duty claims against Petitioner rest on allegations that Detroit procured sludge disposal at inflated prices and thereby increased its charges for sewerage services. (*Id.* ¶¶ 87-92.)

[4]Section 4c of the Clayton Act, 15 U.S.C. § 15c, allows only state attorneys general to sue *in parens patriae*.

[5]By affidavit, Oakland County's chief deputy drain commissioner stated:

> Regardless of the method of calculation, the County's collection of and administration of money from the municipalities follows procedures established by the Municipal Finance Officers Association as prescribed by the Michigan State Treasurer (See Mich. Comp. L. Ann. 141.421),

contracts and transactions, will the counties be obligated to use their own funds to pay Detroit in the event there is a shortfall in the Sewerage Funds:

> Since Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities in the Southeastern System to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment.

County of Oakland v. *City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984). *Also see* A-9-10, 866 F.2d at 845.[6]

> which require the use of an enterprise fund method. Oakland, therefore, collects the sewage treatment charges which have been billed to the municipalities and deposits such receipts with the County Treasurer in the County's name. Importantly, the County maintains separate, segregated accounts ("Funds") which reflect the receipts collected for each sewer district. Oakland administers those Funds and pays Detroit's sewage treatment bills from those Funds. Oakland pays Detroit out of those funds without regard to whether the municipalities pay in full or on time. Any recovery by Oakland in this litigation will be credited to the Funds.
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> In summary, the County Treasurer obtains the necessary funds to pay Detroit from bills sent by the Districts to the municipalities, and the municipalities in turn obtain their funds by bills sent to the end users. The users pay the municipalities, which maintain segregated sewer accounts, and from those accounts the municipalities pay the County Treasurer, who maintains segregated Funds for each of the Districts. As such, the municipalities "pass through" sewage treatment costs directly to the users.

(R. 351: Affidavit in Support of Motion to Alter Judgment ¶¶ 16(b), 24.) The affidavit mirrors the allegation in both counties' complaints that the counties pass-on all sewerage charges to the municipalities. (Complaints ¶ 20.) Macomb County did not file an affidavit, but relied on the papers filed by Oakland County.

[6]While the Sixth Circuit suggests that the counties might not "be relieved of the responsibility for paying Detroit to the extent the counties might be unable to collect from the municipalities," A-9 n. 5, 866 F.2d at 845 n. 5, the counties do not allege that their damages stem from any failure of the municipalities to pay for sewerage services. Nor is there any allegation that the counties suffered any loss through reduced volume. Because the counties are prohibited by statute from making a profit or loss on the Sewerage Funds, A-21 n. 6, 866 F.2d at 850 n. 6, Mich. Comp. Laws, § 123.745, it is impossible for them to suffer any such damage. Finally, in assuming all damages had been passed on, the Sixth Circuit opinion concedes the absence of any issue of fact.

The process of contracting and paying for sewerage services is in accord with the comprehensive legislative scheme laid out in Michigan Public Act No. 185, Mich. Comp. Laws §§ 123.731 *et seq.* (1967 & Supp. 1988). Section 15 of the Act, Mich. Comp. Laws § 123.745, authorizes municipalities to contract with the counties for sewerage services and the counties in turn to contract with Detroit. It specifically mandates that all costs incurred by the counties will be passed on to the municipalities.[7]

C. *Proceedings Below.*

The defendants, in motions to dismiss the complaints pursuant to Rule 12(b)(6), argued to the district court that the counties lacked standing to sue under Section 4 of the Clayton Act because they had passed on all of their alleged damages to the municipalities, who may in turn have passed any damages on to the end users. The district court granted the motions to dismiss, concluding that because the counties had passed on 100 percent of any damages, the indirect purchasers, not the counties, are the only possible plaintiffs under this Court's reasoning in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). A-29, 620 F. Supp. 1399. The district court subsequently denied the counties' motions to alter judgment on the same ground. A-40, 628 F. Supp. 610.[8]

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[7]Section 15 provides in pertinent part:

> Any charges specified in any such contract [between a municipality and a county] shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the [sewerage] project.

[8]The district court also concluded for essentially the same reasons that the counties lack standing to sue under Article III, Section 2 of the Constitution. Respondents' breach of fiduciary duty claims against Petitioner were dismissed on this ground, and Article III also formed an alternative basis for the dismissal of respondents' antitrust claims. The Sixth Circuit reversed. Defendant City of Detroit and defendants Nancy Allevato, as personal representative of the estate of Michael Ferrantino, Sr., *et al.*, have filed petitions for a writ of certiorari seeking review of the Sixth Circuit's decision on Article III standing. Petitioner joins in the question presented and relief requested by those petitions with respect to Article III, and notes that if granted, it is also dispositive of respondents' breach of fiduciary duty claims.

On appeal, the Sixth Circuit reversed the district court. The Sixth Circuit acknowledged this Court's statement in *Illinois Brick* and *Hanover Shoe* that a pass-on defense might be appropriate " 'when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged,' " A-18, 866 F.2d at 849, *quoting Hanover Shoe*, 392 U.S. at 494, and *citing Illinois Brick*, 431 U.S. at 724 n.2. It further conceded that "100 percent of the charges imposed by Detroit on the count[ies] were passed on by the count[ies] to the municipalities, which would make the count[ies] a 'conduit' in an economic sense." A-10, 866 F.2d at 845.[9] Nevertheless, the Sixth Circuit concluded that " 'evidentiary complexities and uncertainties' " involved in ascertaining the damages of the municipalities and end-users make it inappropriate to permit the defendants to assert the pass-on as a defense. A-17, 866 F.2d at 848, *quoting Illinois Brick*, 431 U.S. at 732.

In its order denying defendants' petitions for rehearing and suggestions for rehearing *en banc*, the Sixth Circuit expressly acknowledged that its refusal to recognize a pass-on defense, in spite of the conceded total pass-on to the municipalities, was in conflict with the reasoning of the *en banc* Seventh Circuit in *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 109 S. Ct. 543 (1988) (Posner, J). The Sixth Circuit stated:

> [T]he *Illinois Brick* Court's observation that a "cost-plus" contract exception "might be permitted" was limited to contracts for a fixed quantity. 432 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.

[9]For the purposes of this petition, Petitioner assumes, as did the Sixth Circuit, that the counties were "direct purchasers." Petitioner notes, however, that the counties are at best direct purchasers only of sewerage services. They are indirect purchasers of sludge disposal services, the market in which the alleged antitrust violation occurred.

> 1988) (*en banc*), *cert. denied*, __ U.S. __, 102 L. Ed. 2d 573 (1988), we do not think the purpose of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

A-27, 866 F.2d at 852.[10]

This petition is filed to seek a resolution of the conflict among the circuits on the important issue of whether and under what circumstances a federal antitrust defendant may defend on the ground that 100 percent of the plaintiff's alleged damages have been passed on to others farther down the distribution chain.

REASONS FOR GRANTING THE PETITION

The issue presented by this petition involves a pure question of law on undisputed facts, and an acknowledged conflict among the circuits. In *Panhandle Eastern*, an *en banc* opinion authored by a noted antitrust scholar, the Seventh Circuit held that where a utility paid a supplier's illegal overcharges but passed 100 percent of those charges on to the utility's residential gas customers pursuant to state regulation, those customers (and the state attorney general as *parens patriae*) were the *only* parties with standing to sue for the injury passed-on. In the present case, the Sixth Circuit held—completely to the contrary—that the counties have standing to sue notwithstanding the conceded fact that they have passed on 100 percent of the alleged overcharges to their customers in accord with a state statutory scheme. The Tenth Circuit, in *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir. 1989), *petition for cert. filed sub nom. Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 88-2109), has also explicitly rejected the view of the *en banc* Seventh Circuit. The Fifth Circuit, however, earlier reached a conclusion consistent with the Seventh Circuit in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

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[10]In an apparent typographical error by the publisher, the final portion of the quoted passage is omitted from the published version of this order.

This conflict among the circuits has come about because, while this Court in *Hanover Shoe, Illinois Brick* and most recently in *California* v. *ARC America Corp.*, __ U.S. __, 109 S. Ct. 1661 (1989), stated that a 100 percent pass-on "might" be used either offensively or defensively in cases brought under Section 4 of the Clayton Act, it has not resolved this issue or established the parameters of the pass-on theory. The conflicting decisions of the courts of appeal are sowing confusion among litigants and the lower courts, and are frustrating the uniform administration of the antitrust laws. This case squarely presents an issue which should be resolved by this Court.

I.

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE *EN BANC* DECISION OF THE SEVENTH CIRCUIT IN *PANHANDLE EASTERN.*

Like the *en banc* Seventh Circuit in *Panhandle Eastern*, the Sixth Circuit conceded that pursuant to state regulation, 100 percent of any damages were passed on to the purchasers of a utility service. Yet despite the conceded 100 percent pass-on, the defendants were denied a pass-on defense. Although the Sixth Circuit alludes to problems of apportionment of damages among purchasers at different levels of the distribution chain, it fails to acknowledge that no such problems exist in the present case, where the pass-on—at least to the municipalities—is *conceded to be total.*[11]

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[11] In the present case, it need not be resolved who among the municipalities and the end users is a proper plaintiff. Notably, however, municipalities and end-users have filed suits, virtually identical to the counties' complaints, which have been stayed pending the outcome of the appeal process. *Charter Township of Canton, et al.* v. *City of Detroit, et al.*, No. 86-CV-70642-DT (E.D. Mich.); *County of Oakland, Alice Shoenholtz, David Snyder and all other persons similarly situated who are end users of the Detroit Water and Sewerage Department* v. *Charles Beckham, et al.*, No. 86-CV-74656-DT (E.D. Mich.). These lawsuits base standing on the pass-on of charges to municipalities and end users.

The conflict between the Sixth and Seventh Circuits is complete. In *Panhandle Eastern*, Central Illinois Light Company ("CILCO") purchased natural gas from Panhandle "at prices allegedly inflated because of violations of the antitrust laws by Panhandle." 852 F.2d at 892. CILCO resold the gas to its residential customers, passing on the entire overcharge in accord with state utility regulation. The Illinois Attorney General sued *in parens patriae* to recover the overcharges for CILCO's customers.

A panel of the Seventh Circuit held that the residential customers, and the state on their behalf, were indirect purchasers who lacked standing to sue. Although the contracts between CILCO and those customers were "cost-plus," they did not require customers to purchase a "fixed quantity" of natural gas. The panel believed that a "fixed quantity" requirement was necessary to avoid problems of damage apportionment between the direct purchaser and its customers. 839 F.2d 1206, 1209-10 (7th Cir. 1988). It relied on this Court's statement in *Illinois Brick*, 431 U.S. at 736, that "[i]n such a [cost-plus contract] situation the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." 839 F.2d at 1210.

On rehearing *en banc*, the Seventh Circuit rejected the reasoning of the panel and held that the attorney general had standing to sue on behalf of CILCO's residential customers. The court concluded that although the quantity of natural gas purchased by residential customers was not fixed by contract, they had no alternative source for this utility service. Because of this fact, and because there was "a contract that required 100 percent passing on, and an acknowledgement of 100 percent passing on in every kilowatt hour resold to CILCO's residential consumers," 852 F.2d at 894, there was no problem of apportioning injury between CILCO and its residential customers. Those customers, and not CILCO, suffered all of the injury and had exclusive standing to sue for the alleged overcharges.

The Seventh Circuit's reasoning applies precisely to the present case. The relationship between the counties and the municipalities involves a service for which the municipalities and end users have no alternative source. Michigan law requires a 100 percent pass-on of Detroit's charges. The counties are conduits, no more and no less. Under *Panhandle Eastern*, the municipalities or end users, not the counties, have standing to sue for any overcharges.

The Sixth Circuit, in its order denying the petitions for rehearing, expressly rejected the reasoning of the *en banc* Seventh Circuit and adhered to the rigid "fixed quantity" test of the Seventh Circuit panel. A-27, 866 F.2d at 852. In explicitly rejecting the reasoning of the Seventh Circuit, the Sixth Circuit created a clear conflict among the circuits.

The Tenth Circuit has also rendered a decision in conflict with *Panhandle Eastern*. In *In re Wyoming Tight Sands Antitrust Cases*, the Tenth Circuit refused to permit states as *parens patriae* to sue on behalf of gas customers, even assuming arguendo that there was a "perfect and provable pass-on of the allegedly illegal overcharge . . . ." 866 F.2d at 1293.

The decision below, and *Tight Sands*, also conflict with the Fifth Circuit decision in *In re Beef Industry Antitrust Litigation*. The Fifth Circuit in that case permitted offensive use of a pass-on where there is the "functional equivalent" of a cost-plus contract, and rejected "fixed quantity" as the *sine qua non* of a "functional equivalent." 600 F.2d at 1163-64.

This disagreement among the circuits is creating confusion and uncertainty in antitrust enforcement. This Court should grant review to resolve the conflict among the circuits.

II.

THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE WHETHER A PASS-ON DEFENSE EXISTS.

This case squarely presents the question of whether and under what circumstances a defendant may assert a 100 percent pass-on

as a defense. This is an important issue under Section 4 of the Clayton Act left unresolved in this Court's prior decisions.

In *Hanover Shoe*, United Shoe Machinery Corporation sought to defend against a customer's Sherman Act Section 2 claim on the ground that the plaintiff had passed on the illegal overcharge to its customers. While this Court rejected a broad pass-on defense, it

> recognize[d] that there might be situations—for instance, when an overcharged buyer has a preexisting "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present.

392 U.S. at 494.

In *Illinois Brick*, this Court considered whether an indirect purchaser could use the pass-on theory offensively in circumstances where *Hanover Shoe* would preclude defensive use of a pass-on. The Court answered this question in the negative:

> [The rule] regarding pass-on in antitrust damages actions . . . *must apply equally to plaintiffs and defendants.*
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> We . . . decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers.

431 U.S. at 728, 735 (emphasis added). The Court again observed, however, that under *Hanover Shoe*, a defense might be permitted where there is "a pre-existing cost-plus contract." 431 U.S. at 736.

Most recently, in *California* v. *ARC America Corp.*, 109 S. Ct. at 1666 n. 6, this Court reiterated "that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them."

Notwithstanding this Court's equation of offensive and defensive use of a pass-on in *Hanover Shoe*, *Illinois Brick* and *ARC America*, the Sixth Circuit in its order denying rehearing concluded that "defensive use of a pass-on theory" should be permitted, if at all, in even more limited circumstances than the

"offensive use" at issue in *Panhandle Eastern*. A-27, 866 F.2d at 852.[12] This conclusion not only conflicts with *Panhandle Eastern*, but ignores this Court's reasoning in *Illinois Brick*.

Whether and under what circumstances a 100 percent pass-on may ever be asserted as a defense is an important question which has not been, but should be, resolved by this Court. Because the existence of such a pass-on is uncontroverted in this case, it is an ideal vehicle for the Court's resolution of this issue.

III.

THE DECISION BELOW RAISES IMPORTANT ISSUES AS TO WHO AMONG DIRECT AND INDIRECT PURCHASERS MAY SUE FOR AN ANTITRUST VIOLATION.

The issues raised in this case—both *whether* a pass-on defense exists and *when* a 100 percent pass-on can be used either defensively or offensively—are important to the orderly administration of the federal antitrust laws.

In spite of the fact that the counties passed on 100 percent of any overcharges, the Sixth Circuit granted antitrust standing to the counties on the basis that the counties had a contractual relationship with Detroit:

> The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A-10, 866 F.2d at 845. The Sixth Circuit emphatically answered this question in the negative, notwithstanding that the counties—as dictated by state statute—emerge unharmed from the contractual relationship with Detroit.

If left unreversed, the Sixth Circuit's decision will result in a litany of antitrust suits by administrators or surrogates who have

[12] See pp. 7-8, *supra*.

passed on 100 percent of alleged damages, without the injured party ever appearing before the court. And when the injured indirect purchaser does appear before the court, as in the present circumstance where municipalities and end users have also filed suit,[13] which party has standing to bring the lawsuit? Or do both the direct and the indirect purchaser have antitrust standing, because one serves as a contractual "conduit" while the other suffers the economic injury?

The Sixth Circuit refused to accept a pass-on defense despite the conceded 100 percent *vertical* pass-on to the municipalities because of supposed difficulties in *horizontal* damage apportionment among the municipalities or end users. A-23; 866 F.2d at 851. Is the Sixth Circuit correct in relying on difficulties in horizontal apportionment of damages as a reason to reject the pass-on? Or was the Seventh Circuit correct that *Hanover Shoe* and *Illinois Brick* were concerned only with vertical apportionment? *See Panhandle Eastern*, 852 F.2d at 893-94, 897.

The Sixth Circuit's opinion is either illogical or inconsistent. It confers standing on parties that have suffered no antitrust damages and denies standing to parties that have suffered 100 percent of the damages. Alternatively, the Sixth Circuit's opinion confers standing on direct purchasers who acted only as a conduit and *at the same time* confers standing on indirect purchasers who bear the antitrust injury as a result of a perfect pass-on. The result is doctrinal inconsistency and serious confusion among litigants and the courts.

The Sixth Circuit not only ignored the truly injured parties in conferring standing on an administrator, but also chose rigidly to apply the "fixed quantity" cost-plus contract language of *Illinois Brick*. Must a pass-on arrangement, to confer standing on the indirect purchaser, always be accompanied by a contractual obligation to purchase a fixed amount of the product? Or, as the Seventh Circuit held, is it enough that the direct purchaser acts like a fixed quantity reseller, with incentive to pass on the entire overcharge? *See Panhandle Eastern*, 852 F.2d at 895-96.

[13]See note 11, *supra*.

Finally, is the Sixth Circuit correct that there are circumstances where a pass-on may be used offensively, but not defensively? Was this Court incorrect in *Illinois Brick* when it reasoned that the pass-on theory must apply equally to defensive and offensive use? 431 U.S. at 728, 736. The Sixth Circuit has invited this Court to issue a writ of certiorari by rejecting this Court's direction to apply the pass-on theory equally to plaintiffs and defendants.[14]

The Sixth Circuit's rejection of a pass-on defense even where state statute mandates a 100 percent pass-on invites duplicative lawsuits and recoveries by direct purchasers who are only a "conduit" and indirect purchasers who pay 100 percent of the alleged damages pursuant to a perfect pass through. This problem is exacerbated by state antitrust standing statutes repealing *Illinois Brick*, which were upheld in *ARC America*.[15]

This Court should grant certiorari to determine who among direct and indirect purchasers have standing to sue when 100 percent of the alleged damages are passed on. The Sixth Circuit decision squarely presents this question. It is a question that will plague litigants in cases where indirect purchasers seek to sue by asserting a 100 percent pass-on offensively, and in cases where the direct purchaser and its attorneys seek a windfall recovery despite a 100 percent pass-on to indirect purchasers.

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[14]The Sixth Circuit's refusal to allow a pass-on defense despite its concession that *all* costs have been passed on can perhaps be explained by its eagerness to get at the merits of the case even though the case was before it on a preliminary matter. Telling examples include the Sixth Circuit's failure to distinguish between those defendants who have been prosecuted and convicted in prior criminal cases and those who, like Petitioner, the Mayor of Detroit, have been neither prosecuted nor convicted; and the panel's insinuating citation to a Shakespeare sonnet supposedly relevant to "the nature of their crimes and the elements in which these dabblers in sludge and scum worked . . . ." A-7 n. 3, 866 F.2d at 843 n. 3. Petitioner respectfully submits that such innuendos, tending to ascribe guilt by association, are inappropriate considerations for determining standing to sue.

[15]Michigan, fourteen other states and the District of Columbia have enacted "Illinois Brick repealer" statutes. *ARC America*, 109 S. Ct. at 1663 n. 3. In the present case, the municipalities and end users have not only sued through private attorneys, see note 11, *supra*, but have ample incentive to sue through their state attorneys general as *parens patriae*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari.

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July 17, 1989

APPENDIX

COURT OF APPEALS OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-1200/1217/18/66/67/68/1303/34

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND,
Plaintiff-Appellant,
Cross-Appellee,

and

THE COUNTY OF MACOMB,
Intervening
Plaintiff-Appellant,
Cross-Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN,
Defendants-Appellees,
Cross-Appellants,

and

COLEMAN YOUNG, *et al.*,
Defendants-Appellees,
Cross-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 27, 1989

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. Oakland County, Michigan, brought a federal antitrust and RICO action against the City of Detroit and its mayor, among others, on account of alleged overcharges for sewerage services. Macomb County, Michigan, was allowed to intervene in the action as an additional party plaintiff.

The prices paid for the sewerage services were a function of the costs Detroit incurred in providing them. The plaintiff counties claimed that these costs were excessive, Detroit allegedly having procured sludge disposal services at inflated prices set in a price-fixing conspiracy, with enough padding to cover illegal kickbacks to city personnel. The complaints also alleged that the counties, as opposed to the City of Detroit, collected sewerage fees from municipalities located within sewerage disposal districts operated by the counties, and the complaints alleged that Detroit was paid not by the local municipalities, but by the counties.

The district court dismissed the complaints on the grounds that the counties lacked standing to sue. The counties were mere intermediaries, the court concluded, and the municipalities bore the full burden of the alleged overcharges when the municipalities paid the bills submitted to them by the counties. The counties thus could not show that they had suffered the sort of "injury in fact" necessary to confer standing under the Constitution, the district court held, just as they could not show that they had been injured in their "business or property" within the meaning of that phrase as used in the statutes on which suit was brought.

Both counties have appealed the dismissal of their complaints, and Oakland County has appealed an order denying its motion to vacate certain protective orders entered in related criminal proceedings. The defendants have cross-appealed an order denying, in part, their motion to quash a subpoena for certain electronic surveillance materials.

Because we think that the plaintiff counties did allege injuries

sufficient to give them standing to sue, we shall reverse the order of dismissal and direct that the complaints be reinstated. We think it would be inadvisable for us to try to resolve the various discovery issues at this stage of the litigation.

I

In 1977 the United States sued the City of Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of federal environmental laws and regulations.[1] A consent judgment was entered, but the United States became dissatisfied with the pace at which Detroit was moving toward compliance. In March of 1979, following issuance of a show cause order, the court made Coleman A. Young, Mayor of the City of Detroit, the "administrator" of the wastewater treatment plant operated by the Detroit Water and Sewerage Department.

Invoking "the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments," the district court transferred all functions relating to operation of the treatment plant to Mayor/Administrator Young, divesting Detroit's Board of Water Commissioners and the city water and sewerage department of authority vested in them under the city charter. The transfer of functions to Mr. Young was accompanied by a grant of what the order characterized as "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit . . . ." *United States v. City of Detroit*, 476 F.Supp. 512, 515 and 520 (E.D. Mich. 1979). The present appeal, like that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (1984), draws in issue

[1] In the last nine years there have been no fewer than 14 published federal court opinions on matters arising out of the operation of Detroit's sewer system. The reader interested in the background is referred to *United States v. Bowers*, 828 F.2d 1169 (6th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1731 (1988); *City of Detroit v. State of Michigan*, 803 F.2d 1411 (6th Cir. 1986); and *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984).

neither the validity of the court's appointment of Mr. Young as administrator nor the validity of the court's decision to vest in him powers which the city charter placed elsewhere. *Id.* at 292.

Acting in his capacity as administrator, Mr. Young entered into contracts for the hauling and landfill disposal of sludge and scum from the city's wastewater treatment plant. Various improprieties in the formation of thse contracts allegedly increased the city's costs and its charges to the counties; those improprieties form the basis for the counties' action against the city, Mr. Young, the sludge haulers, and certain persons associated with them.

* * *

The Detroit sewage disposal system serves not only the city itself, but the outlying counties of Oakland and Macomb. Oakland County, according to the affidavit of its chief deputy drain commissioner, operates three sewage disposal districts embracing some 35 municipalities. The municipalities have individual sewer systems that are connected to interceptor sewers built and operated by the county. The county sewer lines are connected, in turn, to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and arranges for disposal of the residual sludge and other byproducts of the treatment process. Detroit bills Oakland County for the services provided by the city, and Oakland County bills the local municipalities. Detroit is entitled to be paid by Oakland County, as the affidavit establishes, whether or not the municipalities pay the county on time or in full.

The fees Oakland County charges the various municipalities within its three sewer districts are based upon the county's costs. These include costs incurred by the county under its contractual arrangements with Detroit, costs incurred in building, operating and maintaining the county system, and an allowance for reserves.

The allocation of costs among the municipalities is, for a number of reasons, less precise than it might be. The character of the information used in the allocation process varies widely from community to community, for one thing. In some areas there are no individual user meters and no master meters that accurately

record the flow of sewage. Thus in the Clinton-Oakland district the allocation is based on estimated usage multipled by a flat rate, adjusted by a "unit assignment factor." In the Evergreen-Farmington district the allocation for some municipalities is based on master water meters, while for others it is based on totals compiled from individual water meter readings, adjusted by a multiplier. Some Evergreen-Farmington communities have a separate storm water charge, while others do not. Some municipalities lie within two districts, while others lie wholly in one.

In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland County is directly responsible for operation of the local sewer systems in four communities. The County is also a consumer of sewer services; all Oakland County buildings are connected to local municipal sewer systems in the communities where the buildings are located, and Oakland County receives and pays regular sewer bills like any other end-user in those communities.

The municipalities bill their individual residential and commercial customers under a procedure similar to Oakland County's. Each community that operates its own local system allocates the county's charges among its customers, after adding an amount sufficient to cover sewer expenses incurred at the local level.[2]

* * *

Turning to the specific events out of which the counties' claims arise, the story begins in 1979, when Detroit was seeking new ways of disposing of sludge and scum from its wastewater treatment plant. On May 1 of that year Detroit signed a sludge disposal con-

[2]Macomb County has not provided details similar to those furnished by Oakland County. We are told only that Macomb allocates Detroit's charges proportionately, based on meter readings, and adds a fixed markup. Macomb operates no facilities of its own. To the extent necessary we shall assume, as did the district court, that Macomb County's operations are otherwise similar to those of Oakland County. This does not foreclose the district court from treating the claims of the two counties differently should the facts adduced hereafter warrant it.

tract with defendant Michigan Disposal, a sludge-hauling firm owned by the late Michael Ferrantino. Mr. Ferrantino's estate is a defendant in this action. The contract, which covered only part of the output of the plant, was originally entered into for a term ending on June 30, 1983; the term was later extended to June 30, 1985.

The sludge handled under the Michigan Disposal contract was taken to a landfill owned by Wayne Disposal, another firm controlled by Ferrantino. Michigan Disposal paid Wayne Disposal for the right to use its landfill.

In 1980 Michigan Disposal made an unsolicited proposal for a second sludge-hauling contract, covering the balance of the output of Detroit's plant. The city rejected the proposal, believing that total dependence on a single sludge hauler would be bad policy. Mr. Ferrantino decided to try skinning the cat another way. With defendant Darralyn Bowers, who was a close friend of Mayor Young, Ferrantino contrived a scheme to procure the second sludge-hauling contract for a front company known as Vista Disposal. Also involved in the scheme were defendant Tomlyn, a Michigan Disposal employee, and defendants Cusenza and Valentini. The latter two individuals were employees of Wolverine Disposal, another firm partly owned by Mr. Ferrantino.

Vista Disposal, the front company, was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the sludge hauling industry. Vista submitted a proposal to build a sludge holding pad where sludge could be stabilized and held for up to 12 hours at the treatment plant before being hauled away. The proposal included false statements about Vista's ownership, Owens' experience, and other matters. Mayor Young used his extraordinary court-conferred powers to award the contract to Vista without competitive bidding and without Common Council approval. A subsequent FBI investigation of the Vista scheme led to several of the present defendants being prosecuted and ultimately convicted under the Racketeer Influenced and Corrupt

Organizations Act (RICO), the Hobbs Act, and the federal mail fraud statute.[3]

• • •

Oakland County, soon to be joined by Macomb County, filed the instant civil action in the wake of the criminal investigations. The counties alleged in their complaints that the defendants had conspired to violate the antitrust and racketeering laws, had excluded competition, had illegally fixed the price of sludge hauling, had monopolized the sludge hauling industry, and had imposed illegal overcharges. Relying on § 4 of the Clayton Act (15 U.S.C. § 15) and the cognate provision in RICO, 18 U.S.C. § 1964(c), the counties sought to recover their damages three-fold, along with costs and attorney fees. Each count of each complaint contained a paragraph alleging injury in terms comparable to those in the following exemplar, taken from paragraph 49 of the Oakland County complaint:

> "Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high cost of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct."

Without answering the complaints, the defendants moved for dismissal under Rule 12(b)(6), Fed. R. Civ. P. In an opinion

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[3]Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote, in Sonnet CXI,

> "O, for my sake do you with Fortune chide,
> The guilty goddess of my harmful deeds,
> That did not better for my life provide,
> Than public means, which public manners breeds.
> Thence comes it that my name receives a brand,
> And almost thence my nature is subdu'd
> To what it works in, like the dyer's hand. . . ."

reported at 620 F.Supp. 1399, the district court granted the motions. Subsequent motions to alter judgment were denied (see opinion reported at 628 F.Supp 610), and the counties have appealed. Separate appeals on discovery matters have been consolidated with the appeals relating to the dismissal of the action.

II

The district court, as noted above, dismissed the plaintiff counties' complaints for lack of standing. The burden of any unlawful cost increment fell on the municipalities or the ultimate consumers, the court reasoned, and although the counties did pay a portion of the allegedly excessive costs as customers of the municipalities, the counties were not suing as customers of the municipalities, but as administrators of the "enterprise funds" through which the county sewage systems were operated. In the latter capacity, said the district court, the counties simply acted as collection agencies for the City of Detroit, in effect, and not as buyers of sewerage services on their own account. 620 F.Supp. at 1402-03; 628 F.Supp. at 613. The counties had not themselves suffered any injury in fact, the court concluded, and thus had no standing to sue. It seems to us, however, that the counties must be treated as buyers on their own account. As such the counties did have standing, we think, both as a matter of constitutional law and as a matter of statutory law.

Implicit in the district court's suggestion that it was not the counties which purchased the services from Detroit is the notion that the counties were acting merely as agents, rather than as principals—for the court expressly acknowledged that Oakland County, at least, did actually sign contracts with Detroit. 620 F.Supp. at 1400. *Cf.* 628 F.Supp. at 611. But the complaints—which must be accepted as true for present purposes—allege that it was the *counties*, not the municipalities acting through the counties as agents, that were the contracting parties. These allegations have been verified, in the case of Oakland County, by an uncon-

tradicted affidavit attesting to the fact that "Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of [the county's] three sewage disposal districts . . . ." It was the counties, not the municipalities, that were billed by Detroit, and there has been no showing that Detroit was entitled to look to the municipalities for payment. The counties, in our view, must be treated as direct purchasers in their own right.[4]

It is true that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where we concluded that the pendent jurisdiction doctrine could be invoked in the federal government's environmental action to enable the federal court to decide a sewer charge dispute between Oakland County and the City of Madison Heights, we described Oakland County as "an intermediary only, dependent completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292. We also said that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment." *Id.* at 296. Whether or not the last part of the quoted statement is factually correct, however,[5] our

[4]The counties seem to argue here, as they did in the district court, that "the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit." 628 F.Supp. at 613. The district court dismissed this argument as an "absurdity," and we agree. It is somewhat reminiscent of the old common law proposition that a man and his wife are one person, the husband being that person.

[5]In the case at bar, Defendant Young filed a brief with the district court attaching as exhibits certain contracts entered into by the City of Detroit, through its Board of Water Commissioners, and Oakland County; the contracts provide that "[t]he COUNTY shall pay the BOARD for sewage treatment and disposal service at such rates as the BOARD may establish from time to time." We have seen in these contracts no indication that the counties would be relieved of responsibility for paying Detroit to the extent that the counties might be unable to collect from the municipalities. The district court recognized in this case that a failure of the municipalities to pay "their contractual obligations to the Counties" would injure the enterprise funds maintained by the *counties*. 628 F.Supp. at 612.

1984 opinion made it clear that "[i]n November 1962 *Oakland County* entered into a contract with the City of Detroit by which Detroit agreed to receive and dispose of sanitary and storm sewage . . . and the *County* agreed to a schedule of payments for this service." *Id.* at 291-92 (emphasis supplied). Our opinion also made it clear that service charges were imposed on the municipalities *by the county*; it was a dispute over the amount of the *county's* charges, after all, that was before us in that case.

Our 1984 decision undoubtedly reflected an understanding that 100 percent of the charges imposed by Detroit on the county were passed on by the county to the municipalities, which would make the county a "conduit" in an economic sense. The decision did not say, however, that the county was an agent rather than a principal in the legal sense. Accordingly, in our view, Oakland County is not collaterally estopped from challenging the district court's suggestion that the counties are not actual buyers of the service sold by Detroit. The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A

We shall address the constitutional question first. The Constitution makes it clear that the judicial power vested in the federal courts under Section 1 of Article III extends only to "Cases" and "Controversies." U.S. Const., Art. III, § 2. A dispute in which the interest of the complaining party is purely academic does not qualify as a case or controversy in the constitutional sense; the federal courts are not empowered to decide questions posed by officious intermeddlers having no personal stake in the outcome. To satisfy the "case or controversy" requirement of the Constitution, a complaint must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and

the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

A buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury—an "injury in fact," to use the common expression. As Mr. Justice Holmes put it in discussing the antitrust complaint of a city that claimed to have been overcharged on purchases of pipe for its water mains, "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (majority opinion).

Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned. Just such an issue was present in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and in that case Mr. Justice Holmes—speaking this time for a unanimous Supreme Court—said in effect that the plaintiff who has subsequently passed on the overcharge to his customers is no more deprived of standing to sue than is the claimant whose loss happens to be covered by insurance. *Id.* at 534.

Presented with a similar question in *Adams v. Mills*, 286 U.S. 397 (1932), the Supreme Court (per Brandeis, J.) gave a similar answer. That case was brought by commission merchants who, as consignees of livestock shipped by rail, had been charged illegal unloading fees. The commission merchants sued to recover the unlawful charges notwithstanding that they had already reimbursed themselves out of the proceeds of the sale of the livestock, remitting to their principals only the balance remaining after deduction of the unloading fees. If the defendants exacted an unlawful charge from the plaintiffs, Mr. Justice Brandeis said in explaining why the action would lie,

> "the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers."

Id. at 407 (citations omitted).

Like the Holmes opinion, on which it relied, the Brandeis opinion rejected the argument that the plaintiffs had not been "injured" within the meaning of the applicable statute. Article III was not discussed, but the conclusion that the plaintiffs had been "injured" in the statutory sense necessarily presupposed that the injury was enough to give the plaintiffs the standing required under Article III; if the Court had not believed there was a case or controversy, it could not properly have remanded the matter, as it did, with directions to enter judgment for the plaintiffs. The Court was subsequently to say, indeed, that whether the plaintiff has made out a case or controversy "is the threshold question in every federal case. . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Holmes and Brandeis may have been influenced by concepts of privity that have lately passed out of fashion, but this cannot be said of the court that recently decided *Bacchus Imports v. Dias*, 468 U.S. 263 (1984). The plaintiffs in *Dias* were wholesalers who sought to challenge the constitutionality of an excise tax imposed by the State of Hawaii on wholesale sales of liquor. The plaintiff wholesalers added the full amount of the tax to the full amount of the wholesale prices; the plaintiffs' customers, who were licensed retailers, were charged the wholesale price plus tax. The state

argued that the wholesalers had no standing to challenge the tax because they had not shown that the tax inflicted any "economic injury" on the wholesalers. The Supreme Court rejected this argument out of hand, declaring that the plaintiff wholesalers "plainly" had standing to challenge the tax. *Id.* at 267. (The basis of the challenge was that certain locally produced liquors had been exempted from the tax, with the result that the tax arguably discriminated against interstate commerce.)

The *Dias* court gave two reasons for concluding that the plaintiff wholesalers had shown an injury sufficient to give them standing to contest the constitutionality of Hawaii's tax. In the first place, the Court pointed out,

> "[t]he wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.*

"Furthermore," the Court said,

> "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

Both of these observations seem pertinent to the situation presented in the case at bar. The plaintiff counties were liable for Detroit's allegedly inflated sewerage charges, just as the plaintiff wholesalers in *Dias* were liable for Hawaii's allegedly unconstitutional tax, whether or not the plaintiffs' customers paid their bills. Even if the plaintiff counties were successful in passing on all of the costs allocated to them, moreover, we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' "business."

The counties may not have been in competition with others for the sale of sewer services, but surely these counties were in com-

petition with other counties in attempting to attract and retain people and/or industry and commerce. We are not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live. The district court believed that "supply and demand do not interact" in this situation because the counties are the only source of sewer services within their respective jurisdictions, 628 F.Supp. 613, but this overlooks the fact that no one is required to live or set up shop in Oakland or Macomb County; there are plenty of other counties in the United States. See *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985). It would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and Oakland County's affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit. Much of the relevant caselaw, indeed, seems to treat the imposition of an unlawfully inflated price on a direct purchaser as an injury *per se*. Nothing in the Constitution requires us to hold that the counties lack standing to sue.

B

In terms variously described as "broad" (*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983)), "expansive" (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982)), and "sweeping" (*Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1081 (6th Cir. 1983)), section 4 of the Clayton Act, as codified at 15 U.S.C. § 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A cognate provision in RICO, codified at 18 U.S.C. § 1964(c), provides that:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Are the plaintiff counties proper parties to bring private antitrust and RICO actions under these statutory provisions? We believe they are.

It is not to be gainsaid that the counties are "persons" within the meaning of the antitrust laws. *Chattanooga Foundry v. Atlanta, supra*, 203 U.S. at 396. If they have not been injured in their "business" of furnishing sewer service, moreover, the counties at least sustained an injury in their property when they paid the allegedly excessive charges. *Id.* That injury, as we have seen, was not eradicated for constitutional standing purposes if the excessive charges were subsequently passed on to the counties' municipal customers—and such a passing on of illegal charges does not normally wipe out the injury for antitrust standing purposes either.

In the leading case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the Supreme Court emphatically rejected an antitrust defendant's argument that the plaintiff could have suffered no legally cognizable injury from illegal overcharges that were reflected, in turn, in the prices charged by the plaintiff to its own customers, the Court held that "when a buyer shows that the price paid by him [in a chain of distribution situation] is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Id.* at 489. Justice White's majority opinion in *Hanover Shoe* cited *Chattanooga Foundry v. Atlanta, Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, and *Adams v. Mills* with obvious approval, 392 U.S. at 489-90, and while the opinion noted that some lower courts had sustained the "so-called" passing on defense, it pointed out that "[o]thers, beginning

with Judge Goodrich's 1960 decision in the case before us, deemed it *irrelevant* that the plaintiff may have passed on the burden of the overcharge." *Id.* at 490 n. 8 (emphasis supplied).

Judge Goodrich (a highly respected circuit judge who sat as a district court judge in the *Hanover Shoe* litigation) concluded that the "excessive price is the injury." 185 F.Supp. 826, 829 (M.D. Pa. 1960). Justice White explained that it was unnecessary, in Judge Goodrich's view, to determine whether plaintiff Hanover had passed on the illegal burden to the next group in the chain of distribution, "because Hanover's injury was complete when it paid the excessive rentals and because ' "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" ' and to exonerate a defendant by reason of remote consequences. *Id.* at 830 (quoting from *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533, 62 L.Ed. 451, 454, 38 S.Ct. 186 (1918))." 392 U.S. at 488 n. 6, quoting 185 F.Supp. at 830.

The Supreme Court stressed two reasons, in *Hanover Shoe*, for its decision to reject Hanover's assertion of a "passing on" defense. First, proper application of such a defense would entail proof of "virtually unascertainable figures," showing precisely what prices would have prevailed had the overcharges not occurred, what effect price changes would have had on sales, and so on. 392 U.S. at 493. Second,

> "[I]f buyers [were] subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

392 U.S. at 494. (Emphasis in original.)

In the subsequent case of *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), the Supreme Court, again speaking through Justice White, rejected an attempt by indirect purchasers to make offensive use of the "passing on" concept. In holding that the indirect purchasers could not sue to recover the overcharges passed on to them by a middleman, the Court reinforced the construction that *Hanover Shoe* had given § 4 of the Clayton Act. Under that construction, as the Court explained, "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Id.* at 729. In the case at bar, of course, this construction of § 4 points to the conclusion that the overcharged county, and not any municipality or ultimate consumer, is the party injured in its business or property within the meaning of § 4.

It was the "evidentiary complexities and uncertainties" involved in applying the pass-on concept that seems to have been most influential in bringing the Supreme Court to "the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharges in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 732, 735. Acceptance of the pass-on approach, the Court warned, "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740. Efforts to apportion the recovery among everyone who could have absorbed part of the overcharge "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737.

The *Illinois Brick* court did concede that the difficulties and uncertainties it foresaw would "be less substantial in some contexts than in others." 431 U.S. at 743. In this connection the plaintiffs had argued—with some lower court support—"that pass-on theo-

ries should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids." 431 U.S. at 743. Just such a factual situation had been presented in *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973), *aff'g* 355 F.Supp. 902 (E.D. Mich. 1972)—and this court, in a brief *per curiam* decision, had accepted the pass-on defense in that case. (The plaintiff in *Obron* was a middleman who purchased mesh bags from defendant Union Camp at a fixed percentage off Union Camp's suggested list price; the middleman then resold at list to customers who took delivery of the bags, without alteration, in "drop shipments" from Union Camp.)

In a passage that implicitly repudiated our *Obron* decision, the *Illinois Brick* court rejected the argument that pass-on theories should be permitted for middlemen reselling goods without alteration and for contractors adding a fixed percentage markup;

> "We reject these attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets.
>
> • • •
>
> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the Hanover Shoe rule without justification."

431 U.S. at 744 (footnote omitted).

Although *Obron* itself would doubtless have been decided differently had it reached us after the Supreme Court's decision in *Illinois Brick*, both *Illinois Brick* and *Hanover Shoe* recognized the possibility that there "might" be situations of a different sort where the considerations requiring rejection of the pass-on defense would not be present. Thus a pass-on defense "might" be permitted, the Supreme Court said, "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ." 392 U.S. at 494; 431 U.S. at 724 n. 2.

In the case at bar the district court thought that if the counties could be said to be buyers at all, their arrangements with the municipalities constituted, "in essence," pre-existing cost-plus contracts. 628 F.Supp. at 613. Relying in part on our observation in *County of Oakland v. City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984), that Oakland County was "a mere conduit" through which payment of charges allocated to the municipalities flowed into the coffers of the City of Detroit, the district court decided that it was "easy to prove" that the plaintiff counties had not been damaged. Accordingly, the court concluded, even if the counties could meet the standing requirement, the cost-plus contract exception to the *Hanover Shoe* rule ought to be invoked. 620 F.Supp. at 1402-03.

Mindful, as we were in *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), "of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, assuming it exists, precludes the direct purchaser from maintaining suit in the case at bar. To allow the passing on defense in this particular case, we believe, would invite precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid.

We are not dealing here with a situation in which an antitrust violator has sold a single item to a single middleman who has resold the item under a pre-existing cost-based contract to a single consumer. In a situation of that sort it might well be easy to prove that the burden of the overcharge had been borne solely by the consumer—and in the absence of other consumers, there could not be any problem in determining how to allocate the overcharge at the consumer level.

In the present situation, by contrast, our hypothesis must be that Detroit sold sewerage services, at inflated prices, to counties that resold the services to scores of municipalities; that the counties attempted to pass their costs on to the municipalities under a con-

fusing array of formulae based partly on actual meter readings and partly on estimates; and that the municipalities attempted, in turn, to pass their costs on to thousands of consumers under similar formulae. If both the counties and the municipalities were 100 percent successful in passing all of the overcharges on to the consumers, the logic of the pass-on theory is that the appropriate plaintiffs in this case are not a few dozen municipalities, but thousands of individual householders, businesses, and other consumers. See *Hanover Shoe*, 392 U.S. at 494. "The fact is," as the district court observed in the present case, "that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party." 628 F.Supp. at 612.

For the antitrust violators to be held answerable in damages at all, under the pass-on approach, this case would thus have to be transformed into a massive class action on behalf of a huge group of remote consumers, with or without the municipalities and the counties as additional plaintiffs. The task of determining the actual amount of each individual class member's actual damage would present enormous "evidentiary complexities and uncertainties," to borrow a phrase from *Illinois Brick*, if it would not entail proof of what *Hanover Shoe* called "virtually unascertainable figures."

The risk in adopting the pass-on approach, it seems to us, is not so much that consumers having only a tiny stake in the lawsuit would have "little interest in attempting a class action," *Hanover Shoe*, 392 U.S. at 494, but that self-appointed representatives of the class would have all too much interest in attempting such an action. The net result of our approving the pass-on approach, assuming the class representatives and their counsel would resist the temptation to settle the case for too little, could well be protracted and hard-to-manage class litigation generating large attorney fees, but not necessarily doing much good for any particular individual who did not happen to be a lawyer for the plaintiff class. See *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). "The class action and the entrepreneurial lawyer may be the best possible solution to some legal problems," *id.*, but we think the solution

of choice for the problem at hand is the solution endorsed by Holmes and Brandeis and White, JJ.: "concentrating the full recovery for the overcharge in the direct purchasers rather than . . . allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 735.

We are strongly confirmed in this judgment by the Supreme Court's post-*Illinois Brick* decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). That decision, as we indicated in *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-86 (6th Cir. 1983), directs us "to consider the § 4 inquiry on a case by case basis," applying the factors that historically have "circumscribe[d] and guide[d] the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 459 U.S. at 537. The "factors" mentioned in Justice Stevens' majority opinion in *Associated General Contractors* weigh heavily in favor of concentrating the full amount of any recovery in the counties—where the recovery would, presumably, redound to the benefit of the counties' residents, most of whom presumably would have been ultimate consumers of the allegedly overpriced sewerage services.[6]

The first of the factors that favored judicial recognition of the plaintiff's antitrust claim in *Associated General Contractors* obviously favors recognition of the counties' claims here; in this case, as in *Contractors*, "[t]he complaint does allege a causal connection between an antitrust violation and harm to the [plaintiff] and further alleges that the defendants intended to cause that harm." 459 U.S. at 537.

Although an allegation of improper motive "is not a panacea that will enable any complaint to withstand a motion to dismiss," this

[6]The district court saw no reason why the end users would benefit if the counties' enterprise funds were replenished through a recovery in this litigation. 628 F.Supp. at 613. As we understand it, however, the funds are strictly non-profit, so any recovery would ultimately have to be passed through to the end users via charges lower than those that would otherwise be imposed.

factor "may support a plaintiff's damages claim under § 4. . . ." 459 U.S. at 537 (footnote omitted). It is hard to imagine how improper motives could be alleged any more clearly than they have been in this case.

The next factor on which Justice Stevens found it appropriate to focus in *Contractors* is "the nature of the plaintiff's alleged injury." 459 U.S. at 538. The injury claimed by the plaintiff counties in the instant case is a classic example of precisely the sort of injury with which the antitrust laws were intended to deal; the prices the counties had to pay, according to the complaints, were higher than they would have been had the defendants not broken the law. The fact that the counties' injury, like the injury alleged by the plaintiff in *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982), "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws" is a factor that may in itself be "controlling." *Contractors*, 459 U.S. at 538. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

"An additional factor," *Contractors* says, "is the directness or indirectness of the asserted injury." 459 U.S. at 540. As direct purchasers, the counties obviously assert a direct injury.

The state of the law at the time the antitrust statutes were initially adopted makes the direct injury a particularly significant factor. The substance of § 4 of the Clayton Act, as Justice Stevens pointed out in *Contractors*, 459 U.S. at 530, was originally enacted in 1890 as § 7 of the Sherman Act, and "[t]he repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531 (footnote omitted). The doctrine of privity of contract—specifically mentioned in *Contractors* at 459 U.S. 533—was in its heyday in 1890, and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (quoted in *Contractors* at 459 U.S. 534) stated a truth with which lawyers practicing in 1890 would have beeen totally comfortable when it said that "[t]he general tendency of the law, in regard to damages at least, is not to go

beyond the first step." The generation of which Senator Sherman and Mr. Justice Holmes were both members would have been unsympathetic to the view that the City of Detroit could be sued for damages, in a situation such as that presented here, by any entity with which the city did not have a direct contractual relationship.

The damages claim of the plaintiff in *Contractors* was found to be "highly speculative," a factor that cut against recognition of the plaintiff's action. 459 U.S. at 542-43. The claims of the counties in the case at bar, on the other hand, are obviously less speculative than the claims of remote consumers who, unlike the counties, may have had their individual charges computed on the basis of estimates and arbitrary formulae.

The next factor identified in *Contractors*—"the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits," 459 U.S. at 543—is one we have already addressed. A straightforward action by Oakland and Macomb counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers whose individual claims would present extraordinary complexities. If "the risk of duplicate recoveries" is minimal in this case, "the danger of complex apportionment of damages" (459 U.S. at 544) certainly is not. The task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their places of residence.

Although we have focused primarily on the antitrust laws in the foregoing discussion, most of what we have said is applicable also to the treble damage provision of RICO, 18 U.S.C. § 1964(c), a provision patterned directly on § 4 of the Clayton Act. If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations. See *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), and *Terre Du Lac Association v. Terre Du Lac, Inc.*, 772

F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Under both statutes, on the facts that we are required to assume here, the counties are indeed the proper parties to bring suit. The complaints should not have been dismissed.

III

The various discovery issues raised by the parties are entirely unrelated to the standing issue, and both the protective order from which Oakland County appeals and the order denying in part a motion to quash various subpoenas, from which certain defendants cross-appeal, are interlocutory orders that would not ordinarily be immediately appealable. Indeed, we have previously dismissed attempts to take immediate appeals from these very orders. We think it would be premature to undertake appellate review of the discovery orders before the case is even at issue.

The order granting the defendants' motion for summary judgment is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

COURT OF APPEALS ORDER DENYING REHEARING

Nos. 86-1200/1217/18/66/67/68/1303/34

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND, Plaintiff-Appellant, Cross-Appellee, and THE COUNTY OF MACOMB Intervening Plaintiff-Appellant, Cross-Appellee, v. THE CITY OF DETROIT, et al., Defendants-Appellees, NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN, Defendants-Appellees, Cross-Appellants, and COLEMAN YOUNG, et al., Defendants-Appellees, Cross-Appellants.	ORDER

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

The court having received the defendants' various petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on any of the three suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

After receipt of the petitions for rehearing, we requested that petitioner City of Detroit furnish a record citation for a purported contract that was quoted and relied on heavily in the city's petition for rehearing. The city conceded that the contract was not part of the record, but the city moved to enlarge the record by adding both the contract quoted in the petition for rehearing and a later contract. The plaintiffs have responded in opposition to the motion.

The city had ample opportunity to present this evidence in a timely manner in the district court. It did not do so. Neither did the city move to correct or modify the record pursuant to Fed. R. App. P. 10(e) at the time this case was originally heard. The attempt to change the record after an adverse decision had been rendered by the court of appeals simply came too late. See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 (1977). The City of Detroit's "motion to add documents to record" is DENIED.

If we had been prepared to accept the tendered contracts, it would not have led us to grant rehearing in this case. In our original opinion we assumed, for purposes of the opinion, "that any and all overcharges were passed on to the counties' own customers, the municipalities." Slip op. at 11. The contracts simply confirm what we had already assumed.

The contracts in question do not affect the constitutional standing issue. The initial purchaser in a chain of distribution does not lack standing in a constitutional sense if charges are passed down the line. As we noted in our original opinion,

> "[e]ven if the plaintiff counties were successful in passing on all the costs allocated to them, . . . we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' 'business.' " Slip op. at 14.

The question of whether a plaintiff has standing to sue under the antitrust laws depends largely on prudential considerations, including the importance of construing the antitrust laws in a way that preserves the effectiveness of the private antitrust action and furthers the orderly administration of justice. If the counties are not appropriate plaintiffs because they passed their costs on to municipalities, surely the municipalities, which in turn passed their costs on to individual residential and commercial customers, are not appropriate plaintiffs either. We continue to believe that "[e]fforts to apportion the recovery among everyone who could have absorbed part of the overcharge 'would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.' " Slip op. at 16 (quoting *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 737 (1977)).

Furthermore, the *Illinois Brick* Court's observation that a cost-plus contract exception "might be permitted" was limited to contracts for a fixed quantity. 431 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc), *cert. denied*, __ U.S. __, 102 L.Ed.2d 573 (1988), we do not think the purposes of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

We have also reviewed the petitions for rehearing filed by the other defendants, and we conclude that all of the questions

addressed in those petitions were fully considered upon the original submission and decision of this case. The petitions for rehearing are DENIED.

ENTERED BY ORDER
OF THE COURT
[filed April 19, 1989]
/s/ LEONARD GREEN, *Clerk*

DISTRICT COURT OPINION GRANTING MOTION TO DISMISS

COUNTY OF OAKLAND, by George W. KUHN, the Oakland County Drain Commissioner, Plaintiff,

and

County of Macomb, by Thomas S. Welsh, the Macomb County Public Works Commissioner, Intervening Plaintiff,

v.

The CITY OF DETROIT, Coleman A. Young, Charles Beckham, Nancy Allevato, as Personal Representative for the Estate of Michael Ferrantino, Darralyn Bowers, Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Vista Disposal Inc., Michigan Disposal, Inc., Wayne Disposal, Inc., Wolverine Disposal, Inc., and Wolverine Disposal-Detroit, Inc., Defendants.

Civ. A. No. 84-1068.

United States District Court,
E.D. Michigan, S.D.

Oct. 31, 1985.

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

Facts[1]

Oakland County enters into contracts with the City of Detroit and the Detroit Water and Sewerage Department (DWSD) for the transportation, treatment, and disposal of sewage. The work is performed by the Detroit Waste Water Treatment Plant (DWWTP). Detroit charges Oakland County according to the costs incurred by

[1]This section discusses the facts as *alleged* in the complaint. These are by no means findings of fact.

Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from its municipalities and pays Detroit.

The United States, in 1977, brought a civil action against Detroit and DWSD for violation of federal laws regulating discharge of pollutants. The parties entered into a consent judgment in which the defendants agreed to comply with the federal regulations by upgrading DWWTP. Mayor Young was appointed administrator of the DWWTP to speed up compliance.

Prior to 1979, sludge removed from sewage had been incinerated or discharged into the Detroit River. After 1979, because of the consent judgment, increasing amounts of sludge were required to be disposed of. As a result, Detroit entered into a contract with Michigan Disposal, owned by defendant Ferrantino, for hauling and disposal by landfill. As increasing amounts of sludge were needed to be disposed of, DWSD realized another contract would be necessary.

Michigan Disposal submitted an unsolicited proposal to increase its volume of disposal. DWSD rejected the proposal. Thereafter, Ferrantino and Michigan Disposal decided to establish a front company that would hide the interest of Ferrantino and Michigan Disposal to secure the second sludge disposal contract. Bowers, confidant of Young and Beckham, agreed to advance the scheme that was set forth. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens agreed to form the front company to be known as Vista Disposal Inc., which Owens would falsely hold himself out as owning.

On May 9, 1980, Vista submitted to Beckham its hauling and disposal proposal. Bowers, using her influence as friend of Young and Beckham, tried to speed the consideration and grant the proposal. Young and Beckham agreed to grant the proposal. At the time they did so, they knew or should have known that Vista was a mere front company.

Beckham announced to David Fisher, an employee of DWSD, that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit public bids on such

contracts, and to award the contract to the lowest qualified bidder. Beckham rejected this procedure and instead merely requested Requests for Qualifications. DWSD, through Beckham, then notified Vista that it had been selected.

Carson, Vista's attorney, negotiated the terms of the contract with the City. Bypassing the City Council, Young, purportedly acting under his authority as Administrator of DWWTP, approved the contract. Thereafter, Bowers paid money to Beckham for his aid and influence. Vista then entered into a joint venture with Wolverine-Detroit to perform the contract.

Based upon the above allegations, plaintiffs brought three charges. Counts I and II charge violations of the Sherman Act. Counts III-VII charge violations of RICO. Last, Count VIII charges Coleman Young with Breach of Fiduciary Duty.

Motions to dismiss have been filed as to each Count. For the reasons stated below, the motions are granted.

Antitrust Counts

Defendants have brought motions to dismiss plaintiffs' antitrust counts for several reasons. The threshold issue which must be addressed is that of standing. The action alleges in Counts I and II that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1973), by fixing the price for disposal sludge, excluding competition for disposal sludge, and monopolizing the hauling and disposal of sludge. The Counties have not sued as *parens patriae* on behalf of their citizens because Congress has specifically delegated this power to the various State Attorney Generals. Rather, the Counties maintain that they, themselves, were injured by defendants' actions as direct purchasers.

Plaintiffs allege that they were injured in that the charges collected by Detroit for the treatment and disposal of their sewage have been unlawfully inflated as a result of defendants' antitrust violations. Defendants maintain that plaintiffs have suffered no injury because any inflated sums are collected from the individual municipalities, i.e., they are "passed on" to the customer. This "passing on" defense arises where a middleman sues the seller of a

good or service for an antitrust violation. The defense provides that the middleman is not injured because it passes on any inflated prices to the consumer and the middleman has no standing as it has no loss. It is axiomatic that the Constitution requires that plaintiffs must allege an "injury in fact" to have standing to sue. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Further, standing requirements must be affirmatively pled in the complaint. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The leading case on the "passing on" defense is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Hanover*, the court found that United Shoe had violated section 2 of the Sherman Act by virtue of its leasing of and refusing to sell certain shoe machinery which, in turn, caused inflated prices to Hanover Shoe. United Shoe attempted to assert the "passing on" defense against Hanover Shoe, alleging that Hanover merely passed on any inflated prices to its customers.

The court rejected the "passing on" defense in that case, noting that so long as Hanover Shoe paid more than it should, its profits were lower than they would have been without the illegal activity. Although the court in *Hanover* severely restricted the "passing on" defense, it did not abandon it. The court said:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing on defense not be permitted in this case would not be present. *Id.* at 494, 88 S.Ct. at 2232.

Thus, the "passing on" defense, though limited, is still viable in certain situations.

The Sixth Circuit analyzed the "passing on" defense in *Obron v. Union Camp Corporation*, 477 F.2d 542 (6th Cir.1973). The court of appeals adopted Honorable Philip Pratt's memorandum opinion at 355 F.Supp. 902 (E.D.Mich.1972). In *Obron*, the defendant,

Union Camp, manufactured mesh bags used by produce packagers. Obron, a distributor of these bags, would obtain an order from a customer and then submit it to Union Camp. The bags were sent directly from Union Camp to the customer. Union Camp would then bill Obron at 5% under list price and Obron would bill the customer at the list price. Obron sued Union Camp for Sherman Act violations arising out of the enforcement of an invalid patent.

In allowing the use of Union Camp's "pass on" defense, the district court said, "the crucial issue here is whether the circumstances of the case create a situation where it would be easy to prove that an overcharged buyer has not been damaged". 355 F.Supp. at 906. The court held that the contract was so strikingly similar to a pre-existing cost plus contract that the defense would be allowed. Obron, rather than being injured by defendant's actions, actually profited from them because it recovered, in effect, a sales commission percentage of the cost. Obron had no control over what price was charged customers. Thus, the reasoning of *Hanover*, that plaintiffs could have charged the inflated price without the higher cost and, thus, increased their profits, was inapplicable.

The issue in this case is whether the circumstances are such that proof that any overcharged buyers (i.e., the Counties) have not been damaged is easy to prove. To determine this, an analysis of the contractual relationships involved is necessary. As discussed in paragraph 20 of Plaintiff Oakland County's Complaint:

> Detroit charges Oakland County according to the cost incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit.

The same type of relationship is discussed in paragraph 20 of Macomb County's Complaint.

This relationship was described by the Sixth Circuit in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir.1984). In that case, Oakland County, which was responsible for collecting

charges from the municipalities that used the City of Detroit's sewage disposal system, brought suit against Berkley for declaration of amounts owed by it. In discussing the contract between the County of Oakland and the City of Detroit in which the City of Detroit agreed to receive and dispose of sanitary and storm sewage from the municipalities involved, the court held: "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit". *Id.* at 292. Further, the court held that: "Since Oakland County is a *mere conduit* for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would *result in Detroit's receiving less money* for sewage disposal than was assumed and planned for . . . ." *Id.* at 296 (emphasis added).

[1] In applying the relationship of the parties to the law concerning the "passing on" defense, it becomes clear that the plaintiffs have not alleged the requisite damages to maintain standing in this matter. The Counties sustain no injury because they are only an intermediary. Thus, they derive no profit level which could be injured by the defendants' actions. In effect, the Counties are not really passing on inflated prices to the municipalities because they are not buyers of the service. Rather, the allegedly inflated prices are aimed directly at the municipalities and the Counties merely collect the sums necessary to pay those charges. The Counties are, in a sense, mere collection agencies. The Court, therefore, holds that the Counties do not allege facts sufficient to meet the Constitutional standing requirement of an "injury in fact". There is nothing in the complaints indicating that they suffer an injury.

Further, from a theoretical standpoint, this is a perfect example of when the exception to the *Hanover Shoe* rule should be invoked.[2] The Court's reasons in *Hanover Shoe* for allowing a

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[2]See E. Schaefer, *Passing-On Theory in Anti-trust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.Rev. 883 (1975); R. Harris & L. Sullivan, *Passing on the Monopoly Overcharge; a Comprehensive Policy Analysis*, 128 U.Pa.L.Rev. 269 (1979).

middleman to recover without deduction for "passing on" were the difficulties of the calculation of the overcharge to all the affected customers and the discouragement to the ultimate consumer's suit where he is too little affected to sue. Neither of these problems is present here. Since the municipalities are charged directly for the services rendered, it is no more difficult to trace any overcharges if the consumers (the municipalities) sue than if the Counties sue. Further, if the allegations are true, the municipalities have been significantly affected; thus, there is sufficient incentive for them to sue.

Aside from this inquiry into whether or not there is Constitutional standing, there is a separate inquiry whether the plaintiffs have standing under section 4 of the Clayton Act. As the Supreme Court noted in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983):

> Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a *further* determination whether the plaintiff is a proper party to bring a private antitrust action.

Id. 103 S.Ct. at 907 (emphasis added). So even assuming that plaintiffs had alleged sufficient "injury in fact" for constitutional purposes, and this Court holds that they have not, they would have only cleared the first hurdle. They would also need to show standing as a matter of antitrust law. As interpreted by the Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir.1983), the factors to be considered in determining antitrust standing are:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;

(3) the directness or indirectness of the injury, and the related injury of whether the damages are speculative;
(4) the potential for duplicative recovery or complex apportionment of damages; and
(5) the existence of more direct victims of the alleged antitrust violation.

Id. at 1085. In *Southaven*, it was alleged that defendant Malone intentionally monopolized the food market industry in its local geographic area. When defendant became aware that plaintiff had a tenant prepared to immediately compete in the relevant grocery market, it refused to surrender the premises to Southaven. The Sixth Circuit, applying the factors outlined above, held that Southaven was not a proper antitrust plaintiff.

[2] This Court, applying these factors to this case, finds the Counties are not the proper antitrust plaintiffs. The first three factors discuss the nature of a plaintiff's injuries. As discussed above, the Court holds that plaintiffs have alleged no injury whatsoever; therefore, the first three factors militate against a finding of standing. The fourth factor is whether there is the potential for duplicative recovery. Without needing to decide, the Court notes that the municipalities involved, the citizens of the Counties, and competitor sludge disposal companies might be able to recover for the alleged antitrust violations. Thus, the potential exists. Last, as to the fifth factor, the municipalities, which pay the allegedly inflated amounts which the Counties merely collect, are the direct victims of the alleged violation. The cost is charged directly to them and the Counties merely collect the sums. Application of the *Southaven* factors, then, further supports this Court's finding of a lack of standing on behalf of the Counties.

RICO Counts

[3] RICO provides remedies to anyone "injured in his business or property by reason of a violation of section 1962". 18 U.S.C. § 1964(c). For the reasons stated above, the Court holds that plaintiffs do not have standing to sue. They have not been injured by any of the defendants' alleged activities. As held in *County of Oak-*

land v. City of Berkley, 742 F.2d 289 (6th Cir.1984), "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for". *Id.* at 296. Thus, it is the municipalities who are injured by the inflated prices and, if they do not pay the higher prices, then the City of Detroit takes the loss. Thus, the Counties are acting solely as collectors of these sums and are not injured.

Breach of Fiduciary Duty

[4] Plaintiffs have sued Coleman A. Young for breach of his fiduciary duty as court-appointed Administrator of the DWWTP. Again, plaintiffs allege in paragraph 92 of their respective complaints that their injuries are the unconscionably inflated prices paid for the treatment and disposal of sewage. For the reasons set forth above, the Court holds that the Counties are not injured and, therefore, plaintiffs' counts for breach of fiduciary duty should be dismissed.

An appropriate order will be entered.

DISTRICT COURT ORDER GRANTING MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION
No. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS ALL COUNTS OF THE COMPLAINT

For the reasons set forth in the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss all Counts of the Complaint are GRANTED.

/s/ RICHARD F. SUHRHEINRICH
United States District Judge

Dated: October 31, 1985

DISTRICT COURT OPINION DENYING MOTION TO ALTER JUDGMENT

COUNTY OF OAKLAND, by George W. KUHN, the Oakland County Drain Commissioner,—Plaintiff,

and

County of Macomb, by Thomas S. Welsh, the Macomb County Public Works Commissioner,—Intervening Plaintiff,

v.

The CITY OF DETROIT, Coleman A. Young, Charles Beckham, Nancy Allevato, as Personal Representative for the Estate of Michael Ferrantino, Darralyn Bowers, Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Vista Disposal Inc., Michigan Disposal Inc., Wayne Disposal Inc., Wolverine Disposal Inc., and Wolverine Disposal-Detroit Inc.,—Defendants.

Civ. A. No. 84-1068.

United States District Court,
E.D. Michigan, S.D.

Feb. 5, 1986.

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

On October 31, 1985, this Court granted summary judgment for defendants in this matter, finding that Oakland and Macomb Counties were not the proper parties to bring suit, 620 F.Supp. 1399. The Counties, pursuant to Fed.R.Civ.P. 59(e), have moved to alter this judgment. The Counties maintain that this Court misunderstood the relationships at issue in this case, and that these relationships confirm their standing to sue. To the contrary, the Counties' briefs, which discuss these relationships, merely serve to confirm that the Court did understand the relationships and that its granting of summary judgment was proper.

Macomb County adopts the brief of Oakland County in this motion. However, it is unclear whether the relationships between the relevant parties are identical in the two Counties. For purposes of this motion, the Court will consider that they are.

The relevant relationships, as described by the Counties, are as follows. The Counties contract with Detroit for sewage disposal. The Counties, by statute, own, operate, and administer the sewer systems that connect the sewer systems to Detroit's interceptors. The Counties determine the cost of maintaining the interceptor system, add that cost to the Detroit charges, and then bill the municipalities. The Counties then collect the aggregate fees charged to the municipalities and then pay Detroit from the specific, segregated sewer Funds maintained by the County for each of the three County sewer Districts. It is these Funds that the County seeks to protect by this suit. Similarly, the fees charged the municipalities by the County are paid by the municipalities from their own segregated sewer funds supported exclusively by user fees.

The conclusion that plaintiffs wish to draw from these facts is that the Funds are directly and adversely impacted by the illegal overcharges described in their complaint. These funds, plaintiffs argue, are the ultimately injured entities. The Court disagrees. The Court appreciates and understands the statutorily mandated, active role which the Counties play in the administration of the metropolitan sewer system. However, this alone is not evidence of injury.

[1] The Counties have misconstrued the cause and effect of any dissipation of the Funds which they maintain. The plaintiffs determine the cost of maintaining their interceptor systems, add this to the charges of the City of Detroit, and send an aggregate bill to the municipalities. Any dissipation of the Funds is caused by the failure of the municipalities to pay their contractual obligations to the Counties. The Funds are not injured by the upstream actions of defendants herein; rather, they are injured by the downstream actions of the municipalities and end users. Perhaps a more proper

cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities.

Another concern of this Court, as discussed in its first memorandum opinion, is that of duplicative recovery. The municipalities operate in the same manner as the Counties, i.e., they maintain segregated funds. If the situation were as plaintiffs posit, the municipalities' funds would similarly be dissipated. Thus, under plaintiffs' scheme, the municipalities could maintain a concurrent cause of action. Further, the end users' "funds" would likewise be dissipated. They, too, could presumably maintain an action. Thus, there is great potential for duplicative recovery.

The fact is that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party. The plaintiffs and municipalities are really no more than conduits between Detroit and the end users. It is the end users who must pay any alleged overcharges.

The plaintiffs argue that permitting them, rather than the municipalities or the end users, to bring suit will avoid the problems identified in *Hanover Shoe* and *Illinois Brick*. First, the Counties contend that it is easier for them to trace the alleged overcharges. However, the simple ability to trace the overcharges does not establish the crucial element—injury. Further, the records are just as available to the municipalities and, perhaps, to the end users, which would permit them to trace their overcharges. Second, plaintiffs contend that the individual end users do not have the same incentive, expertise, and resources to bring this action. However, the Supreme Court has, in a similar case, held just the opposite. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184 (1972), the Court stated:

> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the effi-

> cacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. . . . The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

This type of action, then, would install the actually injured parties as plaintiffs, would avoid duplicative recovery, eliminate tracing problems, and provide sufficient resources to maintain suit.

The Counties then argue that, in a sense, they are suing on behalf of the end users, who will benefit by plaintiffs' recovery. The Court has four responses. First, this argument is inconsistent with plaintiffs' contention that it is not a mere conduit for the municipalities and end users. Second, plaintiffs have maintained throughout the proceedings that they are not suing on behalf of the end users (*see* Memorandum on Behalf of Oakland County in Opposition to the Motions to Dismiss Antitrust Counts, p. 6, fn. 1). Third, Congress has established that only a state, acting through its attorney general, may sue as *parens patriae* of its citizens. 15 U.S.C. § 15c(a)(1) (Supp.1983). Fourth, and most importantly, plaintiffs show no reason, and the Court sees no reason, why the end users would benefit by recovery by the Funds.

[2] Oakland County then tries to argue that it itself is an end user of the sewage services and has standing to sue in that capacity. Paragraph 18 of the affidavit of Robert H. Fredericks II establishes that "Wastes from County buildings are discharged into municipal systems which are part of the three Districts. Oakland County pays the respective municipalities for their services just as any other user". The Court agrees that Oakland County would have standing to sue in this capacity. However, there are two problems. First, a fair reading of the Complaint shows that the Counties were not suing in this capacity, but were suing as administrators of the sewage system Funds. Second, if such an action were to be brought, the Counties would be limited to treble damages only for the alleged overcharges attributable to them as end users.

The Counties, in their motions to alter judgment, renew their argument that their "injuries" are redressable under *Hanover Shoe* and *Illinois Brick*. The Court adequately addressed this argument in its first opinion. To the extent new arguments are raised by plaintiffs, however, it will do so again.

[3] Plaintiffs initially argued that the "pass-on" defense was inapplicable here. Now plaintiffs contend that there is no "pass-on" because, in effect, there is no resale. This is because the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit. The absurdity of this argument is shown by *County of Oakland v. City of Berkley*, 742 F.2D 289 (6th Cir.1984), where the County sued Berkley to recover unpaid sewage funds. If, indeed, the parties are really one and there is no resale, why would Oakland bring suit to recover Berkley's contractual obligations? Further, *Berkley* established that if a municipality does not pay its share, either the other municipalities or the City of Detroit, and not the Counties, pick up the slack. Thus, the plaintiffs' argument that they are one with the municipalities and end users fails. Also, it is inconsistent with the Counties' argument that they are not mere conduits.

Plaintiffs further argue that this case is identical to *Illinois Brick* and *Hanover Shoe* and that the "pass-on" defense should not apply for this reason. However, as this Court has previously pointed out, this case differs in two important respects. First, the fundamental reason for not allowing the "pass-on" defense is that the direct purchaser is injured even where he can "pass on" overcharges to an indirect purchaser. This is because he is "passing on" the overcharges at inflated prices, which, when supply and demand interact, reduces the demand for his product. Here, because plaintiffs are monopolies, supply and demand do not interact. Thus, they are uninjured by the alleged overcharges.

Second, the "cost plus" exception, as discussed in *Obron v. Union Camp Corporation*, 355 F.Supp. 902, 907 (E.D.Mich.1972), *aff'd*, 477 F.2d 542 (6th Cir.1973), is applicable here where it was not in *Hanover Shoe* and *Illinois Brick*. Here, the Counties take the cost of the Detroit charges, add that to the

cost of maintaining their systems, and bill the municipalities. In essence, this is a pre-existing "cost plus cost" contract. The Counties have no incentive to absorb any overcharges. Thus, the Counties suffer no injury and lack standing. This is exactly the situation where the exception to *Hanover Shoe* and *Illinois Brick* for cost plus contracts should apply. In essence, plaintiffs are not initially injured and, thus, have no injury to "pass on". They simply serve as an intermediary between the municipalities and Detroit. Plaintiffs are not initially injured by any overcharges because it is not their obligation to pay them. They simply act as bill collectors for the City of Detroit. Thus, either the municipalities or end users who must pay the bills or Detroit itself (which absorbs the charges when unpaid) are injured.

The cases cited by plaintiffs in support of their argument that the "pass-on" defense should not apply are easily distinguishable. In *City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F.Supp. 1320 (N.D.Ohio 1980), plaintiff, a City municipal utility that purchased electricity from defendant and sold it to citizens, was held to have standing to sue. The critical difference between that case and this case is that there, as that Court noted, the plaintiff City of Cleveland had an incentive to absorb part of the overcharge: its need to attract customers. *Id.* at 1324-25. Here, however, there is no such incentive because plaintiffs have monopolies. Thus, if they pass on inflated prices, they need not worry about losing business to other customers. Similarly, *Jewish Hospital Ass'n v. Stewart Mechan. Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981), was a case where, unlike here, the plaintiff had an incentive to absorb the overcharge. *Id.* at 975-77. In sum, the Court agrees that *Hanover Shoe* and *Illinois Brick* favor antitrust suits by the direct purchasers. However, this is a situation where such a presumption does not apply.

Plaintiffs' argument that *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), authorizes a suit such as this (at p. 4 of Oakland's Reply Memorandum in Support of

Motion to Alter Judgment) seriously miscontrues that case. *Hawaii* simply holds that § 4 of the Clayton Act authorizes a state to sue either in its proprietary capacity as a consumer in the marketplace or for injury to its general economy, but not both. *Id.* at 262-3, 92 S.Ct. at 891-92.

As discussed earlier in this opinion, plaintiffs are not suing in their proprietary capacity as consumers in the marketplace. If they were, their damages would be limited to the overcharge attributable to them as end users. Rather, plaintiffs are suing as administrators of the sewage system.

Further, plaintiffs are not suing for injury to their general economy. Plaintiffs have always maintained that they are not suing on behalf of their citizens and such *parens patriae* suits are limited to the states.

[4, 5] The Court must also clear up another misconception. Plaintiffs seem to be of the opinion that this Court found the municipalities were the proper party to bring suit. The issue of the municipalities' standing is not now, and has never been, before this Court. The Court has discussed the potential standing of other entities to show potential for duplicative recovery and to help show why the Counties do not have standing. It would be improper for the Court to rule on the standing of any party not before it. The Court also notes that Macomb County's request for the substitution of the municipalities for the counties pursuant to Fed.R.Civ.P. 17(a) is an improper use of that rule.

[6] The Court also wishes to reiterate its discussion of *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir.1983) where the court found the following factors relevant to determining antitrust standing:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;

(3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;

(4) the potential for duplicative recovery or complex apportionment of damages; and

(5) the existence of more direct victims of the alleged antitrust violation.

Relating these factors to the case at bar, it is clear that plaintiffs do not have standing:

(1) The cause of any harm to the plaintiff is the failure of the municipalities to replenish the funds. There is no allegation that any harm was intentional;

(2) Plaintiffs are not competitors in the relevant market. They are consumers only to the very limited extent of the fees they pay for end use;

(3) Any injury plaintiffs may suffer is indirect through the inability of the municipalities to pay their bills;

(4) There is great potential for duplicative recovery; and

(5) The municipalities and end users are more direct victims of any antitrust violations.

[7] The Court wants to emphasize that it makes no finding whatsoever as to the existence of an antitrust violation. Further, the Court does not deny that the Counties play a very significant role in the administration of the metropolitan sewage system. However, plaintiffs have been unable to allege the existence of an antitrust injury. In a matter that involves the potential recovery of a substantial amount of damages, the Court feels that the party bringing suit, and potentially recovering, must be one injured by the alleged violations.

RICO Claims

Plaintiffs also move to alter this Court's dismissal of their claims under RICO. The Court granted dismissal because plaintiffs did not allege the prerequisite of injury to have standing. RICO, and the issue of standing, have recently been addressed by the Supreme Court. In *Sedima, S.P.R.L. v. Imex Co.*, __ U.S. __, 105

S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985), the Court held:

> . . . plaintiff only has standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

[8] There exists the requirement under RICO, as under the antitrust acts, that the plaintiff must suffer an injury by defendants' actions before it has standing to sue. Here, as discussed above and in the Court's original Memorandum Opinion, plaintiff simply has not been injured by defendants' conduct. Any injury the Counties suffer is a result of the municipalities not fulfilling their contractual obligations. Further, the relationships between the parties, as described in *Berkley* and by plaintiffs, establishes that any failure to pay by a municipality will result in the other municipalities or the City of Detroit picking up the slack. Thus, the Court does not find any possibility of injury to the Counties by defendants' conduct.

Terre Du Lac Assoc., Inc. v. Terre Du Lac, 772 F.2d 467 (8th Cir.1985) does not change this result. In *Terre Du Lac*, plaintiff was a property owners' association complaining about the costs of failing to maintain roads in a subdivision. The Court held that, in that case, plaintiff did not lack standing merely because it may pass its injuries on to its members. Certainly, the Court did not abandon the constitutional requirement of an injury in fact.

Further, *Terre Du Lac* is distinguishable. In that case, the Association suffered an injury and then passed the injury along to its members. Here, the Counties do not suffer an injury which can be passed along to the municipalities. Rather, the Counties serve as mere bill collectors for the City of Detroit. If they are unable to collect, the Counties do not suffer. Rather, any injuries resulting from defendants' conduct, either directly or indirectly, is borne by the municipalities and/or end users. Thus, the Counties suffer no injury which can be passed along.

An appropriate order, in accordance with this Memorandum Opinion, will be entered.

DISTRICT COURT ORDER DENYING MOTION TO ALTER JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE COUNTY OF OAKLAND by GEORGE W. KUHN, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION
NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT

In accordance with the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that plaintiffs' motion to alter judgment is DENIED.

/s/ RICHARD F. SUHRHEINRICH
United States District Judge

DATED: February 5, 1986